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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 235

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LINK-BELT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR LINK-BELT COMPANY.

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BRIEF FOR THE LINK-BELT COMPANY.

Opinions Below.

Reported in 110 F. (2d) 506 are the opinions of Judge Kerner with Judge Major concurring and Judge Treanor dissenting in part. The majority holds *inter alia* that there is no substantial evidence to disestablish the Independent Union of Craftsmen (hereinafter called the "Independent") or to reinstate with back pay Kalamarie, Karbel and Cumorich. The dissent agrees that there is no substantial evidence to disestablish the Independent, but would increase the scope of the 8(1) order and would reinstate with back pay Karbel and Cumorich.

The decision and order of the Board is reported in 12 N. L. R. B. 854.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered April 13, 1940 (R. 1581-1582). The petition for certiorari was filed on July 12, 1940, and was granted on October 14,

1940. This Court's jurisdiction is founded upon section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and upon sections 10(e) and (f) of the National Labor Relations Act.

Statute Involved.

Applicable provisions of the National Labor Relations Act are set forth in the appendix.

Statement.

Link-Belt Company, an Illinois corporation, owns and operates seven plants. The 39th Street Plant, in Chicago, Illinois, which employs between 750 and 1,200 employees, is involved here. It engages in complete steel and iron foundry operations, in the production of cranes, shovels, draglines, mining conveyors, dumps, washers, driers and miscellaneous other steel construction.

On April 19, 1937, Berry, the assistant general manager in charge of the Company's 39th Street Plant, was visited by three representatives of the Independent who announced that they were the executive officers of the Independent which represented a group of employees at the plant and that they wanted the Company to recognize that organization as the sole collective bargaining agency (R. 1143-1144). Berry called for proof of majority, whereupon they submitted their membership records containing signatures (Intervenor's Exhibit 2, R. 1420, 1144-1145). Berry told them that he would have to check the names because he could not take their word for it and it would probably take some time and that they could either wait in his office or go back to their jobs (R. 1145). They preferred to wait, so Berry carefully checked the names with his payroll list (R. 1145-1146, 725). The records contained approximately 760 names out of 1,000 eligible employees on the payroll at this time (R. 725). He told them that he did not have authority to

recognize the Independent and he would have to take up the matter with the executive officers of the Company and that he would like to have time to consult them. Thereafter he talked about this demand with his superiors, Carter and Burnell, vice presidents, and Kauffmann, president of the Company. These officers of the Company obtained legal advice (R. 1146). By letter dated April 21, 1937, Berry received authorization from Kauffmann to enter into a recognition agreement with the Independent (Respondent's Exhibit 28, R. 1413). Berry signed the recognition agreement which had been presented to him by the representatives of the Independent (Intervenor's Exhibit 1, R. 1147, 1148, 1420). At this time the Amalgamated had not made a demand for recognition (R. 163, 146).

On May 7, 1937, the Company received a written request from the Independent for a date to begin negotiations with the Company (R. 1149, 1150, 1414). Thereafter many collective bargaining conferences were held by representatives of the Independent and representatives of the Company. The executive officers of the Company were present at some of the meetings. For the most part negotiations on behalf of the Company were handled by Berry (R. 1150).

The testimony with reference to collective bargaining between the Company and the union is uncontroverted. It demonstrates that the Company met with the union on May 4, 1937, with respect to an increase in wages to the hourly paid employees (R. 740). On May 11th the union demanded a 10 per cent increase in wages, and Berry stated that the Company was unable to meet the union's demand (R. 741); whereupon the Independent met with Kauffmann, the president of the Company, on May 19th, at the downtown office and further pressed its demand for a wage increase. Kauffmann explained that the Company had granted the employees a 6 per cent increase on November 2, 1936, and a 10 per cent increase on May 15, 1936. Finally the Com-

pany agreed to a 5 per cent increase on all hourly rates to be effective June 1, 1937 (R. 741). On May 21, the Company was handed a draft of a contract on wages, hours and working conditions and on the days following there were negotiations on the terms of a contract (R. 741-742, 1457). On June 1, 1937, the union demanded certain changes in the seniority policy, and thereafter the representatives of the Independent conferred with Kauffmann, Carter and Burnell on this question (R. 742, 743). The company refused to sign a contract at that time pending further negotiations and the Company agreed to be bound orally by the terms that had been negotiated (R. 743, 1460). On August 13th, the Independent demanded a bonus payment for night workers. The Company finally agreed to a 5 per cent bonus for night workers (R. 744). On September 17th, the Independent demanded a better vacation policy (R. 744). On October 2nd, the Independent demanded a closed shop (R. 744). On October 8th, the Independent brought up the subject of layoffs and seniority (R. 744-5). On October 22nd, the Independent met with Kauffmann concerning a closed shop (R. 745). On November 2nd, the Independent again met with Berry and demanded a closed shop; Berry refused to grant it (R. 745). On November 9th, the Independent met with Berry on the question of vacations for 1938. On November 15th, the Independent met with Berry regarding the issuance by the Company of a statement of policy embodying the terms which had been agreed upon (Intervenor's Exhibit 9, R. 745, 1460). On December 3rd, the Independent met with the Company regarding vacations (R. 745). On December 6th, there was another meeting about vacations and the issuance of a statement of policy (R. 745, 1464). On February 15, 1938, the Independent met with the Company regarding vacation pay for men who had been laid off during 1937. A further conference on this subject was held on February 21st, and an agreement was finally reached that employees who were laid off in 1937

would be paid the sum to which they were entitled in lieu of a vacation (Intervenor's Exhibit 11, R. 746, 1467). On March 3rd, the Independent and the Company met and discussed the layoff of members of the Independent (R. 746). Matters such as better lighting, better air conditions, and safety were the subjects of collective bargaining (R. 747). In addition to the subjects covered by the above evidence of collective bargaining, individual grievances were presented by various shop stewards to the foremen and heads of departments (R. 747).

For many years Berry had held daily meetings with the supervisory force. The discussions of the group in 1936 turned to labor problems. During the course of the meetings Berry instructed the supervisory staff to refrain from engaging in union activities and to refuse to give employees advice on whether they should join a union or what union they should join (R. 1153, 1154). These instructions were passed on to the foremen by the top supervisory staff (R. 931).

The evidence shows beyond any question that both competing unions, that is the Amalgamated and the Independent, engaged in union activities to a certain degree on company time and that the matter of keeping the men at work, avoiding their congregating, talking about unions, and distributing literature during working hours, was a serious problem (R. 901).

The record is full of instances of warnings given to members of both the Amalgamated and the Independent (R. 800, 816, 317, 325). In September, 1936, Salmons (a member of the Amalgamated) and Novak were discharged for repeatedly engaging in union activity on Company time. The management believed they were spending more of their time organizing than working (R. 1122-1123, 1132). Salmons admitted union activity on Company time, but thought he had the right to do so under the Act (R. 169, 1122, 1132). Salmons was rehired on December 21, 1936,

after mediation by agents of the Board assigned to the Thirteenth Region (R. 1136-1137). Novak was rehired in January, 1937, not as a result of mediation, but because Berry believed that Novak's violations were of the same nature as Salmons' and after taking back Salmons he should in justice take back Novak (R. 1137).

The Board has deemed pertinent the following evidence which it contends shows domination and interference.

After 1933 the employees bargained with the Company through the medium of a plan of representation known as Link-Belt Employees Board (hereinafter referred to as the "Plan"). The Plan was abandoned upon the decision in the *Jones & Laughlin* case, handed down April 12, 1937 (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). A written memorandum to dissolve the Plan was signed on April 19, 1937 (R. 823), and the Board finds that the recognition of the Independent on April 21, 1937, substantiates the inference that the Independent was an outgrowth of the Plan. This alleged carry-over, in the view of the Board is further supported by testimony that some of the members of the organizing committee of the Independent were Plan representatives and that the organizers of the Independent were hostile to outside labor organizations.

The evidence is clear that the Company did not dominate the Plan. There were no substandard labor conditions at the plant. The evidence further shows that only three out of the seven original organizers of the Independent were Plan representatives, but the founder and the leader of the Independent, Linde, was not a Plan representative (R. 713, 720, 762). On the other hand, Salmons, the leader of the Amalgamated, and Lackhouse, an organizer of the Amalgamated, were Plan representatives (R. 182, 305).

The evidence shows hostility on the part of the organizers of the Independent to the Amalgamated, but it does

not show that the organizers of the Independent were opposed to collective bargaining because the proof of collective bargaining by the Independent is overwhelming.

The Board introduced evidence showing that Independent lists were hectographed on the Company's machine, and that bulletin boards of the Independent were made by the Company. There was no denial of these facts by the Company, but evidence was introduced, and stands uncontroverted, that the lists were hectographed without the knowledge or consent of the Company by one Elsen who stayed after working hours (R. 1041, 1042) and that the bulletin boards were bought and paid for by one Kovatch (R. 863, 1393). The Board introduced evidence showing that certain supervisory officials conversed with employees about the Independent and one foreman assisted several employees to sign an Independent petition. In general there was a denial of these activities on the part of the foremen involved. Belov, one of those whom the Board found engaged in union activities, was not in a supervisory capacity; he was a mere workman and was so designated by the Company's records (R. 1070, 1079, 1397).

There is no evidence of any financial aid or assistance to the Independent at any time.

The Company had no voice in the affairs of the Independent and exercised no control whatsoever in its administration. The Independent did not meet on company property. The Company did not permit the Independent to collect dues on Company time. Its sole contact with the Independent was in bargaining on rates of pay, hours of work and other conditions of employment in addition to grievances.

The Company was forced to reduce the number of its employees in October, 1937, due to a sharp decrease in business. Over 100 men in the foundry alone were laid

off (R. 1191). Kalamarie, an employee in the foundry, was laid off in accordance with the seniority policy of the Company. The Board introduced evidence showing that he was active in the Amalgamated and should have been given the job in the foundry which he formerly held. The Company pointed out that in conformity with its occupational seniority policy Kalamarie was laid off according to his length of service as an arc welder, and moreover, that he was laid off for lack of work, and that no one took his job (R. 1374, 958-961).

Karbel and Cumorich were discharged on May 19, 1937, for inefficiency which was clearly observed by their superior and corroborated by time studies. The Board claimed they were laid off for membership in the Amalgamated, but proof that the Company knew of their membership in the Amalgamated is entirely lacking. Both testified that they occupied no office in the Amalgamated and that neither wore an Amalgamated button (R. 409, 567, 568).

Evidence was introduced showing that the Company belonged to the National Metal Trades Association; that the Association possessed an anti-union policy; and that Cousland, an experienced lathe operator and one of the Company's old workmen, sent reports to the Association which were forwarded to the Company. He was paid an average of $9 per month for the reports by the Association which in turn billed the Company (R. 582, 606, 113, 599).

There is uncontroverted testimony that the reports in question had been furnished by Cousland for over 18 years and referred solely to piece work dissatisfaction, tooling and production methods and safety hazards. All witnesses so testified. Cousland's reports ceased in October, 1936, long before any organization activities began at the 39th Street Plant. All the witnesses testified to this fact, and the Board conceded it (R. 113, 584, 1159).

Summary of Argument.

I.

The Board's new theory that it properly found the Independent dominated because the Company failed affirmatively to disavow the plan is based upon the assumption that the employees had settled convictions that the company favored a particular type of labor organization when the Independent was organized. There is no evidence of 'settled convictions' in the record and the Board made no finding of 'settled convictions', and, even if there had been a finding based on evidence, the failure to disavow would not have proved domination. Moreover the Act does not require the Company to issue a public statement of neutrality.

The employees were not subjugated or influenced under the Plan, and the *Jones and Laughlin* decision ended the Plan in the minds of the employees. They formed the Independent as a new organization which had no connection with the Plan. The leadership of the Independent was different. The Company properly recognized the Independent upon proof of its majority.

The isolated instances of union activity by supervisory employees did not show the domination of the Independent by the company which was prohibited by Congress. Furthermore, the nature and results of the collective bargaining demonstrated that the Company exercised no control over the Independent.

The Act was intended to encourage collective bargaining through inside unaffiliated unions as well as outside unions. The intention of Congress was to prohibit "control" or an "overriding of the will" of the employees by the employer. It accomplished this by condemning "domination"

of a labor organization. The court below adopted an interpretation of Sections 8(1) and 8(2) of the Act consistent with the intention of Congress and properly decided that the evidence did not warrant a finding of domination and order of disestablishment. Both the finding and the order of the Board must conform to the purposes of the Act and the standards laid down by Congress.

II.

The court below properly held that Salmons was discharged for reasons other than union activity; that Kalamarie was laid off in strict conformity with the company's seniority policy and that no one took his job; that Karbel and Cumorich were properly discharged for inefficiency; and that there was no condition attached to the hiring of Frank Solinko. Accordingly, the company did not by these acts violate sections 8 (1) or 8 (3) of the Act.

ARGUMENT.

The Board's brief in support of its decision on what it calls the basic question in this case asserts the proposition that:

> "Where one of the consequences of past violation is the employees' settled conviction that the employer desires a particular type of organization, the employer must take appropriate steps to disabuse the employees of this notion before they are truly free to exercise an unimpeded choice between that type of organization and any other. And whether in a particular case the action taken by the employer is sufficient for this purpose is, of course, a question of fact entrusted to the Board for determination" (Bd. brief, p. 26).

We contend that there is no evidence in the record to justify the Board's suggestion regarding a "settled conviction" of the employees and no such finding was made in the decision and order; that the Board can not assume such a "settled conviction" merely on account of the existence of the Plan; that there is nothing in the Act which requires the Company to conclude that there is a "settled conviction" in the minds of its employees and to take some affirmative action to remove it; and that the Act confers no power upon the Board to decide finally whether "the action taken by the employer is sufficient for this purpose."

We shall show that in this case the Board was taking for granted something that did not exist and that there is no justification in the Act for denying the right of the employees to organize merely because the employer has not done something which the Board assumes it ought to have done. Such an assumption of power on the part of the Board would afford it the opportunity to prohibit almost all inside unions.

I.

THERE IS NO SUBSTANTIAL EVIDENCE UPON WHICH TO BASE A FINDING OF DOMINATION.

A. There Is No Evidence That the Employees Had a Settled Conviction That the Company Preferred a Particular Type of Labor Organization; and the Act Does Not Require the Company to Issue a Public Statement of Neutrality.

This is the first time that the Board has relied upon the "settled conviction of the employees" in an effort to sustain its order. After taking evidence, it relied for the most part on certain findings of foreman activity and of a linking of the Independent with the Plan because of similarity in leadership. Its answer to the petition for review and its request for enforcement of its order to the court below was based on the findings. The presentation in this Court is on different grounds. Without any finding on the "settled conviction" of the employees and without any finding that the Company should have taken affirmative action by a public announcement of its neutrality, the Board for the first time states that on these grounds its order should be enforced. The failure to make such findings in the decision and order was due to a total absence of any evidence of a settled conviction of the employees as to what the Company desired or did not desire. The Board has no right to present these matters here for the first time.

It is no answer that other findings are sufficiently broad to permit such *argument,* because its presentation is not as an argument but as a proper conclusion from certain evidence. We refer to the Board's statement on page 26 of its brief that: "and whether, in a particular case the action taken by the employer is sufficient for this pur-

pose, is, of course, a question of fact entrusted to the Board for determination." The Board cannot make a finding here for the first time and particularly when there is nothing in the record upon which to base it.

The obvious fallacy in the Board's argument is that it takes for granted a state of mind which does not exist and which the Board cannot say is reasonable from all of the facts in this case. The Board admits that its theory is based on mere conjecture when it states:

> "The employees would *naturally* regard the new organization which they were sponsoring as continuing to enjoy the Company's favor and support." (Bd. brief, p. 27.) (Italics ours.)

Had the employees had a "settled conviction" that they would lose their jobs if they did not form a labor organization to the Company's liking there would be a necessity for a public announcement. However, even assuming that they had a "settled conviction" that the Company preferred a particular type of labor organization, there would be no justification for a finding that a public announcement was necessary and the absence of it evidence of domination. Here there was neither a finding of "settled conviction" nor any evidence upon which one could be based.

The Board's argument that there was no affirmative action by the Company to disabuse the employees of such "settled conviction" is not evidence to support the finding that the employees must have linked the Independent to the Plan. The Board has assumed that the employees had settled convictions in order to support the conclusion that they must have linked the Independent to the Plan.

Rather than answer this argument which was based upon a pure assumption, we shall point out that the Board's finding that the employees must have linked the Independent to the Plan is not supported by evidence and that, on the contrary, there is positive uncontroverted evidence that the

employees viewed the Independent as a new union which they were free to join or refuse to join as they desired.

B. Employees Were Not Subjugated or Influenced Under the Plan.

There is no evidence that wages, hours or working conditions were below standard during the existence of the Plan. There is no evidence that any employee was ever discharged or reprimanded for failure to participate in the Plan. There is no evidence that the employees had a "settled conviction" that the Company desired a particular type of labor organization.

Management's role in the Plan was slight. The Company was only entitled to have one representative present. He had no right to vote (R. 1299). The constitution and by-laws of the Plan encouraged the representatives "to speak out" (R. 1300). There was no limitation upon the right to strike.

The Board relies upon a statement to the Plan representatives by Berry in 1936 indicating that "Berry forcibly impressed upon the Employees Board the respondent's anti-union sentiments" (R. 1525). There is no evidence that any member of the Plan was so impressed or felt himself intimidated, but on the contrary, Lackhouse, who was a representative at this time and who subsequently joined and became an active organizer for the Amalgamated, said:

> "Mr. Berry at the meetings of the old Board never did say anything against the C. I. O.; he never did knock it in my presence." (R. 282).

Moreover, Salmons, also a Plan representative and subsequently the chief organizer of the Amalgamated, testified that the fact that he had been a representative under the Plan did not affect him in his C. I. O. organizing efforts (R. 183). The Board's inference that the Plan representatives were affected by the statement in 1937 ignores positive evidence to the contrary.

In the absence of evidence of subjugation or influence of the employees under the Plan, the technical defects cannot supply "Compulsions" relied upon by the Board. (Bd.'s brief, p. 26). The courts have condemned inferences when there is positive testimony to the contrary. *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339-343; *Appalachian Elec. Power Co.* v. *N. L. R. B.*, 93 F. (2d) 985, 989 (C. C. A. 4); *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951, 958 (C. C. A. 4).

In finding domination from the existence of a "dominated old plan" the Board has gone further than resorting to inference in the face of controverting positive testimony; it has drawn an inference from an assumed state of mind.

C. The Jones & Laughlin Decision Ended the Plan in the the Minds of the Employees.

There is no evidence that the Plan existed in fact after its illegality was determined in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. There is no evidence of any action by the Plan thereafter except formal dissolution. There is no evidence that the Plan was used to assist in the establishment of the Independent. The Independent did not spring from a Plan representative nor from any action by the Plan.

The Plan was abandoned in fact on April 12, 1937, seven days before its formal dissolution (R. 825), because the record clearly shows that the employees were aware that the decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, applied the Act to the plant and meant the end of the Plan (R. 183, 825). The Board's decision recognized that the decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, "threw out" the Plan in the minds of the employees (R. 1526).

Ray Froling testified that the Plan was thrown out be-

cause it was illegal when the Wagner Act was declared constitutional (R. 825-826).

Frank Lackhouse testified that when the Wagner Act was enforced it threw out all of the representation plans and that Mr. Berry told the Board that the Wagner Act was constitutional and applicable to the Link-Belt Company so the Plan was abandoned (R. 305-306).

Louis Salmons testified that after the Supreme Court passed on the constitutionality of the Act the Plan was thrown out (R. 183).

George F. Linde testified that the employees anxiously awaited the decision in the *Jones & Laughlin* case, knowing that it would affect employee representation (R. 714-715, 758-759).

There is uncontradicted testimony that when the Act was declared constitutional the employees knew that they had the right to form and join a labor organization of their own choosing without interference, restraint or coercion by the Company.

John Litster testified that he was glad the Wagner Act was constitutional so that the men could form their own union (R. 796).

Ray Froling testified that when the Wagner Act was declared constitutional, "We were entitled to a union if we chose it * * *" (R. 825).

John J. Kovatch testified that when the Wagner Act was declared constitutional by the Supreme Court it was a case of getting a union (R. 860).

George F. Linde testified that when the *Jones & Laughlin* case was decided the employees knew they were entitled to form their own union (R. 715).

There are numerous and uncontradicted statements by employees to the effect that the Independent was a new union that started the last of April or the first of May,

or after the Wagner Act was declared constitutional (R. 570, 715, 527, 796, 165, 314-315, 640, 860, 362). Paul Bozurich, one of the complainants, explained why he went to an Independent meeting, although he was a member of the Amalgamated, by stating: "* * * then came another union, the drive for another union, and there were certain points which I wanted to clarify to myself as to what sort of union that is that is coming in" (R. 462). There is no evidence that any of the employees heard of the Independent prior to the *Jones & Laughlin* decision.

D. The Independent Was a New Organization Having No Connection With the Plan.

The Board argues that the Independent was a mere replacement of the Plan because it followed it in point of time and that therefore the employees of necessity linked the Independent to the Plan and by so linking the two the employees were unable freely to choose the Independent as a collective bargaining agent (Bd. brief, p. 27). Not only is there no evidence that the employees were dominated or considered themselves dominated under the Plan, but there is no evidence that the employees linked the Independent to the Plan. Instead, there is uncontradicted evidence, as pointed out (*infra*, pp. 15-17), that the employees believed that the Independent was a new bargaining agency in a changed order of employer-employee relations and that they were free to join or refuse to join the Independent. There is no evidence that the employees were coerced into joining the Independent. Instead, there is evidence that the employees freely chose it as their collective bargaining agent. There is no evidence that the employees chose it because of a "settled conviction" that the Company preferred that type of labor organization.

We set forth below, in order to facilitate comparison, some of the major differences between the Plan and the Independent. These differences show clearly that the em-

ployees formed an organization different from the Plan,—so different in all material respects that no employee could have supposed that the Independent was the same kind of an organization as the Plan.

The Plan.	Independent Union of Craftsmen.
1. Name. Link-Belt Employees Board.	1. Name: Independent Union of Craftsmen.
2. No employee joined but was automatically a member and entitled to vote. (R. 1297.)	2. Each member joined and membership was limited to those who made application, paid initiation fee and were accepted. (R. 1451-56.)
3. No dues, initiation fee, buttons or a bank account. (R. 1197, 281.)	3. Dues, initiation fee, buttons, and a bank account. (R. 749, 850, 854, 337.)
4. Foremen eligible. (R. 204.)	4. Foremen ineligible. (R. 1451.)
5. Held no general membership meetings. (R. 148.)	5. Held general membership meetings. (R. 749.)
6. Meetings on company property. (R. 1196.)	6. Meetings in union hall off company property. (R. 750.)
7. No attorney. (R. 1197.)	7. Attorney. (R. 719.)
8. Company participation in internal organization. (R. 1299.)	8. No Company participation of any kind. (R. 719-721, 1451-56.)
9. No connection with Caldwell-Moore plant. (R. 1296.)	9. One of two Locals. (R. 1452.)
10. No basic agreement with management on working conditions. (R. 1198.)	10. Basic agreement with management on working conditions. (R. 743, 1460.)
11. Not incorporated. (R. 1296.)	11. Incorporated. (R. 1448.)

E. The Leadership of the Independent Was Different.

Not only were there such differences in all material respects that no employee could have supposed that the Independent was the same kind of an organization as the Plan,

but there was dissimilarity in leadership. At various times the following employees were elected Plan representatives: Salmons, Lackhouse, Litster, Froling, Brucks, A. Johnston, Kachinsky, Daugherty, Kvet and Wendell (R. 1301, 305, 152). Of this group, Salmons and Lackhouse became active organizers for the Amalgamated (R. 152, 305, 295). Litster, Froling and Brucks were induced to become active organizers for the Independent by Linde (R. 720), who was the originator and leader of the Independent. Linde was never a Plan representative, while Salmons, the leader of the Amalgamated, was a Plan representative (R. 713).

The Independent committeemen as designated in the constitution were Brucks, Linde, Rask, Froling, Rosenbaum, Jeske and Litster (R. 1315-1316). Four of these seven had never been Plan representatives.

The first permanent officers of the Independent were Rask, president of Local No. 1, Kovatch, vice president, Conybear, secretary, and Rosenbaum, treasurer (R. 737), none of whom had been Plan representatives.

The following were elected stewards of the Independent: Walker, Milke, Hacker, Conybear, Heyer, Davis, Paulson, Zwart, Boynton, VanBerdandt, Schroeder, Kuehn, Kockinsky, Masilione, Balton, Robinson, Miller, Wildheim, Ehbert, Monroe, Reidel, Hallet, Ross, Bullard, Fagerstrand, Paldo, Belanger, Steele and Brucks (R. 748). Twenty-eight of the twenty-nine stewards had never been Plan representatives.

The following members of the Independent appeared to be most active in solicitation of members and collection of dues: Kovatch (R. 658), Robinson (R. 660), Petrouski (R. 529), Jamieson (R. 362), Erickson (R. 349), Linde (R. 344), Brucks (R. 348), Johnson (R. 314), Froling (R. 283), Balton (R. 287), Jeske (R. 222), and Kresge (R. 872). Ten of this group of twelve had never been Plan representatives.

Accordingly, the record shows that the leaders of the Independent consisted almost exclusively of employees who had no prior official connection with the Plan. The Independent was originated and gained its impetus through Linde, who had no connection with the Plan.

Therefore, the employees could not have linked the Independent with the Plan.

F. The Company Properly Recognized the Independent Upon Proof of Its Majority.

The Company recognized the Independent upon adequate proof that it represented 760 out of 1,000 eligibles employees. The Amalgamated had made no request for bargaining rights (R. 164). According to Salmons the membership of the Amalgamated never approached a majority (R. 207, 1234). The Independent was recognized after Berry checked the proof for genuineness and after the Company executives considered the request for two days, during which time legal advice was obtained (R. 1143-1146).

The Board concluded that the "haste" of recognition favored the Independent (R. 1534). But so-called "hasty recognition" is significant only where there are conflicting claims, and the proof of majority of the union recognized is inadequate. *International Association of Machinists* v. *N. L. R. B.*, 110 F. (2d) 29 (App. D. C.), aff'd No. 16, October Term, 1940; decided November 12, 1940. *N. L. R. B.* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2), modified 309 U. S. 629.

In the cases cited by the Board in support of the proposition that a "hasty" grant of recognition is an indication of an employer's support (Bd. brief, p. 41), recognition was given without proof of majority, and in *N. L. R. B.* v. *Falk Corp.*, 102 F. (2d) 383, 388 (C. C. A. 7), and *N. L. R. B.*

v. *Lund*, 103 F. (2d) 815, 817, 818 (C. C. A. 8) there cited, the employer had previously refused to deal with an outside union.

The Company had no alternative under section 8 (5) of the Act other than to recognize the Independent.

The Board argues at length that under the circumstances the Company was obligated at the time of the decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, to take affirmative action by a statement of public withdrawal of backing of the Plan representatives or by a statement of public neutrality in order to release the employees from the "compulsion" to which they had been subjected, and the failure to publish such a statement rendered the employees incapable of organizing an undominated labor organization (Bd. brief, p. 26). The Board then argues that whether the action taken by the employer in a particular case is sufficient for this purpose is a conclusion of fact entrusted for determination to the Board. No finding or conclusion with reference to affirmative action was made in the decision and order.

Assuming that the men desired the Independent, what could they have done to accomplish that result which was different from the steps taken? The Board's argument, followed to its logical conclusion, means that because the men did the right thing to get that result, and acted promptly, it must be assumed that they were in effect merely continuing the Plan, and the subsequent recognition by the Company,—even though the Company had no excuse for not recognizing the Independent—was evidence that the Independent was dominated. If the Company fails to do this positive act, which the Board urges should be done, no inside unaffiliated union formed by the employees could be other than a dominated union; not because of anything the men should have done, but because of something the Company did not do.

The Board relies upon *Westinghouse Electric & Manufacturing Co.* v. *N. L. R. B.*, 112 F. (2d) 657 (C. C. A. 2) (cert. granted, No. 447, October Term, 1940), and *N. L. R. B.* v. *Swift & Co.*, decided November 20, 1940 (C. C. A. 8).

In *Westinghouse Electric & Manufacturing Co.* v. *N. L. R. B.*, 112 F. (2d) 657, the Second Circuit based its decision of domination on the fact that the independent was formed at a meeting of a representation plan, and because the representatives under that plan had made a canvass of the employees in their official capacity while the plan was still in existence. In the case at bar there was no official action taken by the Plan in the initiation or development of the Independent. Even if that court was correct in concluding that the employer had a duty to openly disavow the plan, the court's conclusion may be justified on the ground that the employees were led to believe that the representation plan was the means of initiating the Independent, whereas, here the employees could not have made such an assumption.

The Board relies on *System Federation No. 40* v. *Virginian Railway*, 11 F. Supp. 621 (D. C., E. D. Va.) for the proposition that the activities of former plan representatives in a successor independent is evidence of domination of the latter (Bd. brief, pp. 31, 32). In that case the railroad was enjoined from attempting to "influence" or "interfere" with the employees. The Court of Appeals held that there was ample evidence that the railroad had unduly "influenced" the employees, which is expressly forbidden in the Railway Labor Act (44 Stat. 577; 45 U. S. C. A. Sec. 151). The difference between the Railway Labor Act and the National Labor Relations Act is pointed out (*infra*, p. 32). The evidence of undue influence was in the nature of coercion, including threats that the railroad would abandon its car shop if the A. F. of L. came

in, and one of the superintendents of the railroad urged membership in an inside union at the same time that he purported to explain the employees' rights under the Railway Labor Act. Furthermore, Hearne, chief organizer of the successor independent, was found to be acting for the railroad and not representing the employees in good faith. In this case, the prime mover of the Independent, Linde, had no official connection with the Plan, and the Board does not even suggest that Linde was not in good faith representing the employees.

Likewise in *N. L. R. B.* v. *Swift & Co.*, decided November 20, 1940 (C. C. A. 8), the court based its decision of domination on the fact that the association was formed by the assembly plan representatives at the last assembly plan meeting. The plant superintendent at that meeting advised those present to choose an inside group of representatives and suggested an attorney for the new group. Its first bargaining committee consisted of 15 employees, 14 of whom were former plan representatives. The court concluded that the company took advantage of the existing organization and of the authority of certain members of its assembly. Here, no such conclusion would be justified and the employees could not have assumed that the Plan was the means of initiating the Independent.

We have pointed out that there is no evidence to show that any of the employees entertained a settled belief that the employer desired a particular type of organization; that the employees had not been subjected to compulsions under the Plan; that there could have been no linking of the Plan to the Independent in the minds of the employees; and that the employees were fully aware that the Independent was a new organization formed under new conditions. The Board's view that affirmative action should have been taken by the Company means that the Board interpreted its own decision as requiring affirmative action.

Moreover, nothing in the Act requires the Company to take action which would remove any such "settled conviction" from the minds of its employees, and there is nothing in the Act which prohibits the employees from acting on their own initiative, even if the Company maintains silence.

The Board, with equal justification, might have concluded that the Company preferred no union at all, and, had there been no subsequent labor organization, the Company would have violated the Act by failing to make a public announcement after the decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The interpretation which the Board gives the Act would place both the employer and the employees under the domination of the Board and deprive the employees of the freedom which the Act intended to confer. In a situation such as existed here, only an outside union could satisfy the Board that the employees' "settled conviction" had been removed or could be disregarded. It will be demonstrated later that any such interpretation of the Act by the Board is contrary to the intention of Congress and violates the legislative standards created by that body.

G. Both the Amalgamated and the Independent Solicited and Collected Dues on Company Time But Without the Knowledge or Permission of the Company.

The Board has argued that the solicitation which the Company allowed the Independent organizers to carry on during working hours without interference by the supervisory staff constitutes support to a labor organization and interference with its affairs (Bd. brief, pp. 34, 35).

The Board fails to note many instances where organizers for the Independent were warned and threatened with dismissal by the Company for engaging in union

activity on Company time. Hubert Brucks, one of the organizers for the Independent, testified that he solicited a few men for the Independent on Company time, and was caught by his foreman, Longwell, who warned him to stop because he was being paid for working (R. 829, 830). Ray Froling testified that he was warned by Fred Skeates, superintendent of the foundry, regarding solicitation and was told to stay by his machine and not run around (R. 816, 822). John Litster, organizer for the Independent, testified that he was told by his foreman, Carlisle, that he was not allowed to go around on matters not Company business and that if he did it again, he would get fired (R. 800, 802). George Linde, originator and prime mover of the Independent, testified that Longwell, a general foreman, told him "Don't let me catch you collecting dues or engaging in union business on Company time or we will fire you" (R. 781). Linde also testified that he was warned by two supervisors "to cut out the monkey business and stay around the bench" (R. 760). Linde complained that he was closely watched and that several of his associates told him that they were warned about walking around the shop when they were on legitimate business (R. 760, 781). Ralph Kresge, one of the organizing committee of the Independent, was reprimanded by Fred Skeates, foundry superintendent, when he was caught talking to an individual with one of the Independent cards in his hand. Skeates told him the next time it would be too bad for him (R. 872).

The cases uniformly hold that no inference can be drawn from solicitation on company time by one competing union when the employer has stopped such solicitation when it was brought to its attention and when both the competing unions engaged in the same practice. See *Ballston-Stillwater Knitting Company* v. *N. L. R. B.*, 98 F. (2d) 758, 761 (C. C. A. 2); *Cupples Co. Manufacturers* v. *N. L. R. B.*, 106 F. (2d) 100, 108 (C. C. A. 8).

The Board relies on *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318; and *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, to support its statement that solicitation on company property is an "organization hall-mark" of employer support (Bd. brief, p. 35). We have demonstrated that the Independent was not permitted the use of Company time or property, and if its organizers did solicit on Company time, it was without the knowledge and permission of the Company. In both of these cases cited by the Board, solicitation was merely a part of the program of the policy-making officials of the companies (president in the *Bradford* case, and plant manager in the *Fansteel* case), who personally initiated and promoted the respective independent unions.

The Board has also relied on a quotation from *International Association of Machinists* v. *N. L. R. B.*, No. 16, this term, decided November 12, 1940, condemning the freedom of activity permitted one group as contrasted with the close surveillance of another. In the case at bar there is ample evidence that the Amalgamated as well as the Independent solicited membership and collected dues on Company time. The following record pages disclose solicitation or collection of dues by the Amalgamated on Company time: 917, 918, 921, 900, 904, 889, 910, 913, 894, 895, 862, 822, 826, 827, 1060, 881, 880.

It was so obvious from the testimony during the course of the hearing that both sides engaged in union activity on Company time that the Trial Examiner stated:

> "Trial Examiner McCarthy: I think the record is pretty clear that it worked both ways" (R. 901).

There is no substantial evidence that workmen solicited in the presence of their supervisors. Union conversations, solicitations and the collection of dues by both competing

unions were carried on when supervisors were out of sight (R. 857, 864, 818, 695).

There is ample testimony by various foremen that they were instructed specifically on union activity about the time the Wagner Act was declared constitutional, and that they knew the men had to be kept at work and would not be allowed to roam and talk whenever they please (R. 1016, 1017, 1019, 1047, 1048, 1055, 928, 1003, 1004, 1009, 1047, 1048, 1055, 1019, 1017-1019).

The Board offers as proof of its argument that the Company high-pressured the men into membership in the Independent Union the fact that 760 employees were enrolled in the Independent in the space of three days (Bd. brief, p. 20). The Board does not mention the number of employees who were engaged as solicitors for the Independent. Although there was no evidence introduced for the purpose of showing the exact number of solicitors, it is incidentally revealed that at least 22 employees were active in soliciting the original 760 members of the Independent (R. 222, 283, 286, 289, 314, 354, 356, 362, 425, 428, 529, 717, 797, 831, 851, 857, 871, 877, 880, 905, 906, 912, 919).

The Board names only 7 as solicitors for the Independent and does not mention the evidence that the 22 or more solicitors were besieged with requests to join the Independent. Linde stated that it (the Independent) was so big a feature that they were all anxious to get on the bandwagon and do something (R. 717-718). Litster testified that "They came to us, flocked to us to sign" (R. 797).

It is apparent from a careful reading of the record that there were even more than 22 employees soliciting the original members of the Independent (R. 831). The fact that there was a minimum of 22 employees soliciting

a large group of fellow workers who were anxious to join makes the result of 760 members a natural consequence and not, as the Board would make it appear, a suspicious achievement.

H. The Isolated Instances of Activity by Supervisory Employees Does Not Show Control of the Independent by the Company.

The lower court properly concluded, as a matter of law, that the evidence of foremen activity did not justify the finding of domination and the order of disestablishment.

There were between 60 and 70 foremen or supervisors at the plant. The evidence of union activity is directed at 6 of them, Olson, Nyberg, Siskauskis, Belov, McKinney and Staskey. These instances were sporadic and isolated and fail to disclose a pattern showing a predetermination to assist the Independent.

The following is submitted, not for the purpose of detracting from the Board's power to make findings from controverted evidence, but rather to demonstrate that the activities of those concerned did not amount to evidence of control of the Independent.

According to Lackhouse, Olson told him of the advantages of an inside union over an outside union (R. 285, 1529). Lackhouse also stated that Siskauskis signed the names of several employees to Independent petitions (R. 1530). The employees whose names were signed were unable to read or write and Siskauskis signed the name of Thomas only after he "said he could not write" (R. 1530). The Board states that Siskauskis threatened a number of employees with discharge (Bd. brief, p. 17) but no finding to this effect is made by the Board.

Siskauskis denied such threats and the Board in its Brief improperly assumes them in the absence of a finding.

The Court cannot be asked to consider parts of controverted testimony omitted from the Board's finding. *Florida* v. *U. S.*, 282 U. S. 194, 214, 215; *Atchison Ry. Co.* v. *U. S.*, 295 U. S. 193, 201-202.

The Board expressly found that its witness, Balcauski, stated in reply to Siskauskis that he (Balcauski) was a member of the C. I. O. and under the Wagner law foremen were not allowed to talk to the men and he (Balcauski) was not going to waste his time (R. 1530). This demonstrates Siskauskis' lack of influence.

The Board found that Siskauskis attended for a short time the first mass meeting of the Independent, but there is no finding by the Board that he participated in the meeting in any way or stayed for more than a short time (R. 1528, 1530).

The Board found that one of the witnesses, Kalamarie, testified that Belov received written instructions from McKinney ordering him to attempt to get the night foundry men to sign up in the Independent, and that Belov asked Kalamarie's advice and thereupon tried unsuccessfully to solicit Kalamarie and others (R. 1531). The Board did not call Belov to prove that he had received any such instructions. The instructions were not introduced in evidence and McKinney denied giving them. The whole incident is vague and uncertain as shown by the Board's findings, and it is based upon testimony of a witness who related what he had read from written instructions.

The Board found that Belov was a supervisory employee (R. 1532). Belov was an hourly paid workman,—a truck driver, burner and checker (R. 983, 1073, 1080, 1092). Irrespective of whether or not Belov was a supervisory employee, the Board's findings show that he was not influential within the group of workers in the night shakeout gang. The Board found that he did not know why

certain men in his group were laid off (R. 1542). The Board further found that he was carried on the Company records as a night checker (R. 1531). It is clear from the Board's own findings that the employees could not have believed that Belov carried any more authority than to transmit simple instructions and his activities did not give the Company control over their choice of the Independent.

The Board relied on the testimony of Lackhouse to find that Nyberg said to go ahead when Lackhouse asked if he could soilicit for the Independent (R. 1529). But there is no finding that he was given permission to do this on Company time and Lackhouse's testimony shows that he was not given this permission (R. 291). At this time Lackhouse, according to the decision and order, was a member of the Amalgamated (R. 1529). The findings of the Board further show that Lackhouse was uneasy about solicitation (R. 1529).

The findings with reference to Stasky will be taken up under the "Solinkos" (*infra*, p. 62).

The Board relies on *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 250, 262, in contending that the activities of these six supervisory employees are evidence of domination (Bd. brief, p. 37). In that case the company's plant superintendent originated a plan for an inside union in connection with an anti-C. I. O. campaign and in both of these causes he was assisted by foremen. The Court found there was substantial evidence that the Independent was organized as a result of these promotion efforts of the plant superintendent and the foreman. In *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; and *N. L. R. B. v. Pacific Greyhound Lines, Inc.*, 303 U. S. 272, also relied on by the Board (Bd. brief, p. 37), the evidence clearly showed that independent unions were initiated and formed by the pol-

icy-making officials of the companies involved. In *N. L. R. B.* v. *American Manufacturing Company*, 106 F. (2d) 61, 64, 68 (C. C. A. 2), modified 309 U. S. 629 (Bd. brief p. 37), a foregirl, who had been at one time active in a company-dominated union and instrumental in the company's plan to establish individual bargaining representatives, was the principal initiator and promoter of the Independent, and on this evidence the Court found she was acting for the company.

Thus all the cases cited by the Board for the proposition that the activities of the six supervisory employees establishes company domination are clearly distinguishable from this case on the ground that here the company had no hand in initiating or formulating the Independent and there is no evidence that the company had any program to assist the Independent.

The Board relies upon *International Association of Machinists* v. *N. L. R. B.*, decided by this Court on November 12, 1940, to place responsibility upon the Company for the statements and acts of these six employees because of their supervisory status (Bd. brief, p. 38). The Board's statement implies that the Company is responsible for all statements and acts of supervisory employees. In that case, this Court found that the inference that Fouts, Shock, Dininger and Bolander were acting for the company and not independently was supported by the following established facts: (1) their supervisory status; (2) they were active in the company dominated welfare association; (3) they headed the drive and were the leaders for the I. A. M.; (4) the I. A. M. program served the company's purpose and served no useful purpose for the employees.

In the case at bar, Linde and the other Independent organizers did not occupy the position of supervisory employees. Also those who were supervisors were not carrying out any plan or program; their acts indicated no at-

tempt to control or manage the Independent; and the employees had no reason to suppose that any of their personal opinions were spoken on behalf of the company and not on behalf of the employees. See *Sands Mfg. Co.* v. *N. L. R. B.*, 306 U. S. 332, 341, 342.

These findings of the Board cannot constitute domination. We shall point out later that domination means control. The evidence falls far short of control. Proof of interference by the company through statements of foremen is one thing, but proof that the company controlled the Independent through such statements is another.

Furthermore the evidence in the aggregate does not even show that degree of employer activity intended by Congress as a violation of the Act. The intention of Congress in this respect is important. Section 2(4) of the Railway Labor Act prohibits an employer from assisting or contributing to any labor organization, labor representative or other agency of collective bargaining, or from performing any work therefor, or to "influence" or coerce employees in an effort to induce them to join or remain, or not to join or remain members of any labor organization. In *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568, this Court, in upholding the constitutionality of the Railway Labor Act, set forth standards to be followed by the Board and stated that "influence" meant "pressure". We quote from page 568:

> "The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia* v. *Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.'"

In the report of the Senate Committee on Education and Labor, May 26, 1934, Senate Report No. 1184, 73d Cong., 2d Sess., it is pointed out that the Supreme Court upheld a statute which "was in terms broader than this bill (National Labor Relations Act) for it forbade an employer not merely to interfere with or coerce his employees but even to 'influence' them."

Significantly the word "influence" originally in the Act was removed in subsequent drafts. Hearings of Senate Committee on Education and Labor, 74th Congress, 1st Session, Hearings on S. 1958. Senator Walsh stated at page 305:

> "I do not think there is anything in this bill to prevent an employer when his employees, the men and women, are about to organize, from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a Company union, that is violently opposed to so and so who is attempting to organize a union. I do not understand there is anything in this bill to prevent an employer from doing that, and that is why we struck out the word 'influence,' that would be 'influence' and not interference."

Changes in legislative drafts may properly be considered by the Court as evidencing the intention of Congress. *Federal Trade Comm.* v. *Raladam,* 283 U. S. 643, 648.

The activities above referred to constitute at the most "influence" as was properly pointed out by the dissent below. There was no evidence of interference in the Independent, let alone evidence of control such as we shall later show was intended by Congress in its use of the word "domination".

I. The Nature and Results of the Collective Bargaining Demonstrate That the Company Exercised No Control Over the Independent.

The Board's decision and order ignored the mass of evidence submitted by the Independent and the Company on collective bargaining. The Board announced as a rule of law that collective bargaining had no probative value in this case (R. 1534). The court below considered this evidence of bargaining and the following statement of the dissenting judge is illuminating:

> "It (the Independent) has carried on extensive collective bargaining with the company and I am unable to find anything in the form or character of the bargaining transaction which can reasonably be said to justify an inference that in its bargaining activities the Independent is in any sense controlled in its freedom of action by the company."

The court below had the right to consider relevant evidence which was not considered by the administrative tribunal. *Federal Trade Commission* v. *Curtis Co.*, 260 U. S. 568-580.

One of the purposes of the Act was to encourage the process of collective bargaining as a means of settling disputes which had been burdensome to commerce (National Labor Relations Act, sec. 1, sec. 7). Bona fide collective bargaining is strong evidence that there is no domination and the uncontroverted evidence of such bargaining in this case should have been so considered by the Board.

The administrative agency must consider the paramount aim of the law from which it derives its authority and must be governed by the intention of Congress. *Federal Trade Commission* v. *Raladam Company*, 383 U. S. 643. Furthermore, evidence of uncontrolled and successful collective bargaining by the Independent is strong positive evidence that the employer was not in fact

controlling, dominating or directing the affairs of the Independent.

In contrast, the Board itself has held that the lack of bargaining shows domination and has even based findings of domination under section 8(2) of the Act squarely upon the absence of collective bargaining. *In the Matter of Titan Metal Manufacturing Company,* 5 N. L. R. B., 577; *In the Matter of Skinner and Kennedy Stationery Company,* 13 N. L. R. B., 1186.

The employees acting through the Independent obtained a 5 per cent wage increase June 1, 1937 (R. 741); a 5 per cent bonus for night workers August 13, 1937 (R. 744); a change in the vacation plan (vacation pay for men laid off in 1937 (R. 746, 1167)); a change in seniority policy; and many improved working conditions (R. 740-747). The Independent met with the Company for the purpose of collective bargaining more than 25 times between April, 1937, and March, 1938, the date of the hearing (*supra,* pp. 3-5). In addition thereto, many individual grievances were presented by shop stewards to the foremen and heads of departments (R. 747). Such evidence is of primary probative value in determining the domination issue and it should have been so considered by the Board.

J. The Court Below Adopted a Proper Interpretation of Section 8(2) of the Act in Deciding That the Evidence Did Not Warrant a Finding of Domination and Order of Disestablishment.

The Court of Appeals had the clear right to decide as a matter of law that the findings in the aggregate did not show domination and interference with the formation and administration of the Independent or support thereof and hence the order of disestablishment was unwarranted.

The Act sets forth the scope of review of the Circuit

Courts of Appeal in section 10(e). This section is similar to section 5(c) of the Federal Trade Commission Act. Congress intended that the scope of judicial review provided in the Act be the same as under the Federal Trade Commission Act. The Report of the Senate Committee on Education and Labor, May 2, 1939, Senate Report No. 573, 74th Congress, 1st Session, states:

> "Section 10. Procedure before the Board. This is the most important procedural section. Despite the widespread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal Statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5."

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427, 437, the words "unfair method of competition," not defined by the statute, were in dispute. It was held that it was for the courts, not the commission, to determine ultimately as a matter of law what they include. Mr. Justice Brandeis, concurring in this principle, stated (p. 437):

> "The question whether the method of competition pursued could on those facts reasonably be held by the commission to constitute an unfair method of competition being a question of law was necessarily left open to review by the court. * * *"

To like effect is *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441-453. The same principle is applied in reviewing the conclusions of other administrative bodies, including the Board. *National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 251; *Helvering* v. *Tex-Penn Company*, 300 U. S. 481, 490; *Texas and Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

Section 8(2) of the Act provides:

> "It shall be an unfair labor practice for an employer

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *."

Nowhere in the Act is there a definition of the term "to dominate." Webster's New International Dictionary defines "dominate" as "1. to predominate over; to rule; to govern; 2. to have controlling power over; to be the ruling force in; * * *."

" 'Dominate' is a strong word meaning to master, to rule, to control." *Humble Oil and Refining Co.* v. *N. L. R. B.*, 113 F. (2d) 85, 87, 88 (C. C. A. 5).

The meaning of the words "to interfere with the formation or administration of any labor organization" is clearly set out by Senator Wagner (Congressional Record, Vol. 79, 74th Congress, First Session, p. 7570):

"* * * The undue influence which the employer exercised over the supposedly free agent of his workers may take other forms. It may consist in employer domination of the formation of the constitution or by-laws of a labor organization. The essence of interference is that the workers' organization instead of being absolutely free and independent as an organic entity is subjected in some way to the employer's will."

What was intended by the words of the statute is best described by the following examples taken from the quotations from Committee reports and debates on the National Labor Relations bills appearing on pages 72, 75 of Appendix II:

(1) Employer participation in framing the constitution or by-laws of a labor organization;

(2) When provisions in the constitution or by-laws cannot be changed without the consent of the employer;

(3) When the employer participates in the internal management or elections of a labor organization;

(4) When the employer supervises the agenda or the procedure of the meetings;

(5) Where the employer engages in several lesser interferences so that he overrides the will of the employees;

(6) Where the employer gives financial support to a labor organization.

Section 8(2) of the Act was intended to imply "overriding of the will of the employees" or actual or potential control over the labor organization. There was no evidence here from which a violation may be inferred and the lower court properly concluded as a matter of law that the order of the Board disestablishing the Independent should be set aside.

K. The Order Must Conform to the Purposes of the Act and the Standards Laid Down by Congress.

The Board's order of disestablishment is subject to judicial review. In *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257, this Court stated:

> "The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which adhere in the very policies of the Act which the Board invokes."

Whether administrative agencies validly apply the legislative standards set up and whether they act within the authority conferred or go beyond it are appropriate questions for judicial review. The scope of review extends not only to arbitrary and capricious interpretations of the statute but also to erroneous ones. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 276; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144, 145.

Congress did not intend to outlaw inside unaffiliated labor organizations. *Report of the Senate Committee on Education and Labor,* May 2, 1935, Senate Report No. 573, 74th Congress, First Session (p. 10):

> "This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company."

Report of House Committee on Labor to the Committee of the Whole House on the State of the Union, June 10, 1935,

House Report No. 1147, 74th Congress, First Session (p. 18):

> "Nothing in the bill prohibits the formation of a company union if by that term is meant an organization of workers confined by their own volition to the boundaries of a particular plant or employer."

Congress only intended to eliminate "controlled labor organizations" (Appendix II, *infra*). *Report of Senate Committee on Education and Labor*, May 2, 1935, Senate Report No. 573, 74th Congress, First Session (p. 10):

> "The so-called 'company union' features of the bill are designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies. Such interference exists when employers actively participate in framing the constitution or by-laws of labor organizations; or when, by provisions in the constitution or by-laws, changes in the structure or the organization cannot be made without the consent of the employer. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings. It is impossible to catalog all the practices that might constitute interference which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination the employer may be said to dominate the labor organization by overriding the will of the employees."

We have pointed out above that the Act was devised to protect the right to organize, to encourage the process of bargaining, and to make secure the bargaining agency irrespective of the type of labor organization adopted by the employees. The type of union to be eliminated is only the controlled union, which does not represent the free choice of employees or which is incapable of functioning as a bargaining agency. All other unions, irrespective of whether they are inside or outside unions, affiliated or unaffiliated unions, come within the protection of the Act.

Although the Board has wide discretion in the selection of a remedy, yet a remedy which this Court finds to be in conflict with the purposes of the Act is beyond the scope of the Board's discretionary power. Otherwise, the Board would be the final arbiter in the construction of the statute under which it exists.

The court below recognized that the Board was in error in issuing its orders of withdrawal of recognition and disestablishment in the case at bar. The majority opinion, while reaching the same conclusion as the dissenting opinion on this particular point, reasoned along lines heretofore discussed. Judge Treanor based his decision on alternative grounds which are presently pertinent (110 F. (2d) 516-517):

> "* * * And it follows from the nature and function of an order of disestablishment of a bargaining agent that the policy of the act will not be effectuated by such an order if the agency disestablished thereby is actually the free choice of a majority of the members of the bargaining unit and is genuinely free to represent the interests of the employees in their relation to the employer. Under such circumstances, an order of disestablishment would frustrate, not effectuate, the policy of the Act.
>
> "Since I believe there was no substantial evidence to support the Board's conclusion that petitioner's acts either rendered the Independent incapable of serving petitioner's employees as a genuine bargaining representative, or rendered its continued recognition by petitioner an obstacle to collective bargaining through freely chosen representatives, I conclude that the disestablishment portion of the Board's order was invalid."

That there may be a factual situation which calls for a cease and desist order but not a disestablishment order was anticipated by this Court in *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, where this Court stated at page 270:

> "We may assume that there are situations in which the Board would not be warranted in concluding that

there was any occasion for withdrawal of employer recognition of an existing union before an election by employes under section 9(c), even though it had ordered the employer to cease unfair labor practices."

In *N.L.R.B.* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, it was stated on page 250:

"Sec. 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that section must be limited to the effectuation of the policies of the Act. One of these is that the employees shall be free to choose such form of organization as they wish."

In *N.L.R.B.* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, and in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197; cited on page 43 of the Board's brief and all of the cases cited on page 44 of the Board's brief there was present the element of company control over the union held properly disestablished which is lacking in this case.

The distinction between a "prophylactic" remedy such as a cease and desist order under the Act and a "corrective" remedy, such as disestablishment order, was pointed out by Mr. Justice Brandeis in his dissenting opinion in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 434:

"(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act. And it should do this by filing a complaint with a view to a thorough investigation and, if need

> be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure."

Where no condition of domination or control of a union ever existed, but at the most intermeddling that might have a tendency to lead to control in the future, the corrective remedy of disestablishment is improper. In addition, as the dissenting judge below pointed out, disestablishment on the present record would "frustrate" rather than "effectuate the policies of the Act."

Conclusion of Point I.

There is no evidence of a "settled conviction" by the employees that the Company desired a particular type of labor organization and, in the absence of such evidence and a finding thereon, the Board's argument is improper.

The intention of Congress is apparent. First, the Act was not to be interpreted as eliminating so-called inside unaffiliated unions; second, domination means "an overriding of the will;" third, interference means participation in; and fourth, one of the main objectives was to encourage the process of collective bargaining to lessen disputes burdensome to commerce.

Here, the Company recognized and bargained with the type of union which Congress intended to protect. The bargaining between the Company and the Independent was of advantage to the employees in that they obtained many benefits, and was of advantage to the Company and the public in that there were no disputes burdensome to commerce.

The Board's order demonstrates that the Board wishes to destroy the form of organization chosen by the employees. In so doing it has adopted an unreasonable interpretation of the Act and has plainly violated the legislative standards.

The Board seeks this Court's approval of a formula improperly devised and used by the Board in concluding that the Independent was dominated. This formula is as follows: Given a plan of representation in which the employer participated followed by an inside unaffiliated labor organization, that labor organization must of necessity be regarded as dominated in law.

Because in the past some courts reached automatically from certain factual situations conclusions of coercion, Congress was impelled to pass remedial legislation. (See Clayton Act, 38 Stat. 730; Norris-LaGuardia Act, 47 Stat. 70; Congressional Record, Vol. 79, 74th Congress, First Session, page 7969.) By concluding domination of the Independent from the mere presence of the Plan instead of considering the evidence the Board has fallen into similar error. We respectfully urge that the Court reject the formula and require proof of domination in fact, or proof of an overriding of the will of the employees when they chose the Independent.

II.

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTIONS 8 (1) AND 8 (3) OF THE ACT.

A. Karbel Was Properly Discharged for Inefficiency. Moreover There Was No Proof That the Company Had Knowledge of His Membership in the Amalgamated.

The decision of the Board finds that the Company discriminated in regard to Karbel's hire and tenure of employment, thereby discouraging membership in the Amalgamated (R. 1544). It ordered Karbel's reinstatement to his former position and the payment of back wages.

The Board in its brief adopts a new theory that Karbel was discharged because he refused Belov's alleged request that he join the Independent (Bd. brief, p. 54). Although the Board in its decision and order found that Karbel refused to join the Independent when solicited by Belov, after considering that fact with the evidence that he joined the Amalgamated, the Board concluded "that the real reason" for the discharge was that he joined the Amalgamated (R. 1544). Thus the Board in weighing the evidence for the purpose of determining the Company's reason for discharging Karbel rejected the fact that he refused to join the Independent as the basis for its finding. It is noteworthy that the Company could not have been making an example of Karbel by discharging him for refusing to join the Independent because, as the Board found, Karbel was not given any reason for his discharge (R. 1544). In any event the attempt of the Board in its brief to change the reason for its conclusion is improper. We contend that the sole issue presented by the decision and order is whether the Company discharged Karbel because he joined the Amalgamated. By his own testimony no one knew he joined that union (R. 567). We

also contend that the Board in now attempting to change the basis for the original finding of discrimination recognizes the essential weakness of Karbel's claim that he was discriminated against. This weakness we shall further demonstrate.

Karbel was employed by the Company in March, 1937. He worked for three months, until May 19, 1937, when he was discharged for inefficiency (R. 562). He had worked for the Company between 1925 and 1932 (R. 560, 561). Karbel's testimony shows that he was illiterate (R. 560-568). He worked as a chipper, which entails the removal of rough spots on castings (R. 561).

The record shows that Karbel joined the Amalgamated in the latter part of April, 1937 (R. 562). There is no evidence whatsoever that he was an active member of the union or that he wore his union button in the plant. He testified specifically that he told no one that he joined the Amalgamated. He stated that no one knew that he joined the Amalgamated (R. 567). Therefore, as the court below recognized, an indispensable element is lacking in the Board's case, that is, the Company's knowledge that Karbel was a member of the Amalgamated.

The Board in its brief at this time seeks to supply this essential missing fact by stating that the Company's alleged labor spy "was at that time a member and committeeman of the Amalgamated and attended its meetings" (Bd. brief, p. 54, footnote, 35). Supposition of this kind does not supply a missing finding, and, furthermore, we have pointed out (*supra*, p. 66) that Cousland's alleged surveillance completely stopped in October, 1936 (R. 121, 585, 1535). Salmons testified that Cousland took no part in the Amalgamated's meetings (R. 145, 146), and likewise there is no evidence that Karbel ever attended an Amalgamated meeting.

Without a showing that the Company knew of Karbel's membership the Company cannot be said to have discriminated against him with relation to his hire and tenure of employment by reason of his membership in that union. *Ballston-Stillwater Knitting Co.* v. *N. L. R. B.*, 98 F. (2d) 758 (C. C. A. 2).

Karbel was discharged because he was unable to do the amount of work that the average employee of the Company doing similar work was able to perform. The record substantiates the following facts: Labor costs in Karbel's department were rising (R. 1072). McKinney, the foreman, examined various labor cards, including Karbel's, and made frequent visits to the night shakeout gang in which Karbel worked to determine the reason for the rise. On these visits he would see how much the men had accomplished from the time they started work and would check up the following morning to see how much they actually performed (R. 1073). Karbel was on a piecework basis and his work, as well as the work of others, was easily checked. McKinney observed that Karbel and Cumorich (Cumorich is considered, *infra*, p. 50) were inefficient and McKinney warned them about their lack of production (R. 1077). McKinney then instructed William Peters, the time study expert, to check on their labor cards (R. 1077).

William Peters examined the time cards of Karbel and compared them with the time cards of five other workmen. He also rechecked his findings with a chart frequently used in foundries in connection with the bonus payment plan (R. 1270, 1271, 1415). The Company had made use of the chart in the past and had found it to be true and correct (R. 1271). The chart reduces cleaning and grinding operations in foundries to manits, a term denoting the unit of measurement of labor required to do a particular operation (R. 1270).

Peters' findings were set forth in a recap sheet, Respondent's Exhibit 31 (R. 1419). It shows that on a total of $115.89 worth of work performed by Karbel the Company lost $43.34. The other men in the department with whom Karbel had been compared gained about 28 per cent over the normal whereas Karbel lost 37 per cent (R. 1271, 1272). Peters' findings were reported to McKinney and Karbel was discharged.

The Board attacks Peters' findings as follows: First, the Board points out that each casting is assigned by the foreman to a particular workman for cleaning and it would be entirely possible for the foreman habitually to assign the dirtiest castings to one particular chipper (R. 1543). This is pure insinuation which is unsupported in the record. On the contrary, McKinney testified that no one particular chipper or grinder would be singled out to do less desirable work because it would not be possible to run a modern shop that way. McKinney further stated that it would not be the fair or right thing to do and a foreman could not get the respect of his men if such a practice prevailed (R. 1035, 1083). Karbel made no claim that he received dirtier castings than the other workmen.

Secondly, the Board maintains that conditions on the night shift differed from those of the day shift, and that Peters admitted than none of the other five so chosen for comparison worked on the night shift (Decision, R. 1543, 1544). However, Peters also testified that there is no substantial difference in the day and night work that is performed by chippers and that night chippers do not get dirtier work than day chippers (R. 1279).

Thirdly, the Board attacks the time studies on the ground that the hourly rate of the five employees used for the purpose of comparison was different and in most cases higher than that of Karbel (R. 1544). Here again the Board's conjecture lacks the basis of evidence. Peters testified that the

five men were taken from an entire group and were selected because they performed similar work and that the rates that were applied to the other five men were practically identical to those on which Karbel worked. Peters further testified that there may be 2 tenths of 1 per cent difference and that would not be enough to vary the accuracy of the time study (R. 1273, 1274, 1276). Even if the hourly rate of the five was different from Karbel's the result of the time study would not be altered (R. 1278, 1279).

Lastly, the Board contends that the work of the men was somewhat dissimilar, different piece prices on each job had been established and the total time allotted varied from individual to individual (R. 1544). However, Peters selected the men because of the almost identical work they performed (R. 1275), and the uncontroverted testimony is that while there is a different class of work on the castings, some of them being large and some small, and the condition of the castings may change, yet these matters average out themselves (R. 1035-1036).

While the Board, according to its decision, was not impressed with Peters' testimony, the Trial Examiner thought the opposite. He characterized Peters as an expert (R. 1279).

The respondent had a positive reason for its discharge of Karbel. We respectfully submit that it furnished credible and substantial evidence to prove this reason. This evidence is uncontroverted by the Board, except by insinuation and conjecture. No evidence was introduced by the Board in opposition to Peters or McKinney except Karbel's own statement that he was a good worker and that Belov did not know the reason for his layoff. We have considered Belov's position previously (*supra*, p. 29). The complete disregard of the Company's time studies without any proof that they were not made in good faith was unjustified.

All employers have wide latitude in employing and dis-

charging employees. The only requirement of the Act is that the employee must not be discharged on account of union activities and union affiliations. *Wilson & Co., Inc.* v. *N. L. R. B.*, 103 F. (2d) 243, 250 (C. C. A. 8); *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 168 (C. C. A. 9).

It was said in *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F. (2d) 13, 17 (C. C. A. 6) that

> "Interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Labor Relations Act and * * * the evidence should be strong and convincing that he was discharged for union activities before reinstatement by an administrative board."

In addition the Board conjectures that it was an unusual thing for men discharged from the night shift to be paid in cash (R. 1542). The decision states that customarily they were paid off by the day foreman, McKinney, who had ultimate authority over all employees in the steel cleaning room, including the night shift (R. 1542). There is no evidence that the Company has not always paid in cash. One witness testified that he was given his pay envelope when he was laid off (R. 624). The Board carries its speculation *ad infinitum* when it finally says that "an unusual procedure of giving Karbel his dismissal pay was adopted, a procedure which prevented him from facing McKinney or the workers on the day shift" (R. 1544). Had Karbel wished to face McKinney he could have done so irrespective of whether he had to call for his pay envelope. Any supervisor of a large group of men is bound to lay off or discharge a considerable number over a period of time. It was improper to infer discrimination from this act. The Board drew the inference that Karbel was discharged in an unusual manner because he was paid off in cash. From this inference the Board inferred that McKinney did not want to face Karbel. From that inference, the Board inferred that Karbel was discharged because of his member-

ship in the Amalgamated. Such pyramiding of inferences is condemned in *N. L. R. B.* v. *Empire Furniture Corp.*, 107 F. (2d) 92, 95 (C. C. A. 6).

We respectfully submit that no valid reason was pointed out in the Board's decision why the time studies made by the Company were not to be believed. Unless it can be shown clearly that they were not bona fide, they demonstrate that the Company had a valid cause for the discharge of Karbel. Karbel was an inefficient workman. Even had he been an efficient workman, the necessary requirement that the Company had knowledge of his union affiliations is lacking. There is no proper finding of its violation of section 8 (1) or section 8 (3) of the Act.

B. Cumorich Was Properly Discharged for Inefficiency. Moreover, There Was No Proof That the Company Had Knowledge of His Membership in the Amalgamated.

The Board found that by discharging Nick Cumorich the respondent (Company) discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Amalgamated (R. 1544). It ordered Cumorich's reinstatement to his former position and the payment of back wages at his average earnings prior to his discharge (Decision, R. 1554).

The reason for the discharge of Cumorich was identical to that of Karbel (*supra*, p. 46). Cumorich was employed by the Company for six months prior to his discharge. He started in December, 1936, and was discharged May 19, 1937 (R. 409). He was a common laborer for the most part and performed some work as a grinder in the foundry (R. 412).

He was laid off on the same day as Karbel; he worked on the same shift as Karbel.

Cumorich joined the Amalgamated in the latter part of April, 1937 (R. 409). There is no showing whatsoever in the record that he was active in the Amalgamated; or that he wore a union button; or that the Company had any knowledge of his membership in the Amalgamated (R. 409). Therefore we adopt the same arguments and cite the same authorities as were made and cited with reference to Karbel (*supra*, p. 46).

The Board in its brief has treated Karbel and Cumorich jointly and argues that Cumorich also was discharged because he refused to join the Independent. The Board in its decision and order stated that the real reason for the discharge of Cumorich was the fact he joined the Amalgamated (R. 1544). We refer to our discussion of Karbel on this point (*supra*, p. 44).

Peters made a study of Cumorich's work and while it was difficult to find a basis of comparison, nevertheless from his studies he found that there was a loss of approximately 47 per cent on Cumorich (R. 1272, 1419. See Respondent's Exhibit 32, R. 1271, 1272).

Cumorich was hired as a chipper and grinder. He was used as a laborer for a period of time, to become accustomed to the work and to await an opportunity to locate on a chipping and grinding post. When the opportunity arose he was assigned to grinding small castings in the mill room and after a trial of about seven weeks was found to be unfit for the job for which he was hired. He was discharged after it was discovered that his production was about 35 per cent below the average (R. 1031).

The Board points to no tangible evidence for its refusal to accept the time study evidence of Peters. The Board finds that Cumorich rarely worked on piecework, since laborers are paid on an hourly basis and as a result the efficiency rating based entirely on Cumorich's capacity on piecework would not be a true test of his relative

capability (R. 1543). The Board completely omits the testimony showing that Peters' study was based not only upon comparison with other men, as in the case of Karbel, but it was also based upon Respondent's Exhibit 30, which sets forth the normal rate on the cleaning and grinding of castings. A comparison was made for both Karbel and Cumorich by use of the chart and the computations showed that Cumorich's loss was 47 per cent (R. 1272).

The testimony of Peters showing Cumorich's loss by the Manit chart to be 47 per cent is corroborative of McKinney's testimony that he observed Cumorich and Karbel to be substandard workers (R. 1074). Here again there is no justification in the record for the Board to refuse the positive testimony of McKinney and Peters when no controverting evidence is present in the record.

All the evidence shows that the Company did not know of Cumorich's union affiliations and that he was properly discharged for inefficiency. The findings of the Board that the Company violated sections 8(1) and 8(3) of the Act by discharging Cumorich are clearly erroneous.

C. Kalamarie Was Properly Laid Off for Lack of Work. Moreover No One Took His Job.

The Board found that the Company discharged Kalamarie because of his union membership and activities and ordered reinstatement and the payment of back wages (R. 1549, 1555).

The Board contends that Kalamarie, an arc welder, was laid off out of his usual seniority position and that workmen who had less seniority were retained. We contend that Kalamarie was properly laid off as an arc welder due to lack of work under the Company's policy of seniority and that he had no right to step back to his former occupation of burner.

Kalamarie had approximately two years' service with the Company, being hired November 11, 1935, and laid off November 30, 1937 (R. 621). His first occupation was that of helper in the foundry (R. 628). Early in 1936 he was promoted to the job of burner in the steel cleaning room of the foundry and at his own insistence was promoted to the job of arc welder in August, 1937 (R. 630, 1065, 1066). The last promotion came after he joined the Amalgamated in March, 1937 (R. 621).

In the latter part of October, 1937, the Company's business was sharply reduced. Of 283 employees in the foundry, 100 were laid off during a period of five months beginning in November. The output of the foundry dropped from 794 tons in March, 1937, to 448 tons in November, 1937, and to 250 tons in February, 1938 (R. 937, 938). The Company was forced to reduce the number of its employees and faced the problem of maintaining a force sufficient to operate efficiently at a lower level.

The Company had an established occupational seniority policy. This was expressly found by the Board in holding that the discharge of Bozurich was not discriminatory (R. 1547). The reason for this policy was that the different jobs required different training and in a large lay-off it became essential to retain skilled workmen to handle the different jobs. The Board in its brief states that this policy was only tentative (Bd. brief, p. 56). However, this is contrary to the evidence and the Board's express finding above referred to (R. 624, 1547).

The application of this policy to Kalamarie is as follows: the steel and iron foundry operated in connection with the plant is divided into 14 separate and distinct departments (See Respondent's Exhibits 6 to 19 and 6-A to 19-A, R. 1374, 1392, consisting of seniority lists). Each department is divided into occupations, for example, the steel cleaning department has within it the following occupations: grinders, chippers, cut-off chippers, cut-off men,

truckers, sand blast operators, oven tenders, arc and gas welders, arc welder checkers, inspectors and laborers (Respondent's Exhibit 6-A, R. 1374).

Each one of these occupations has a separate seniority classification list. Kalamarie appears on Respondent's Exhibit 6-A as an arc welder, in which position he had been engaged since August, 1937. The various occupations were established because they required different degrees of skill. An arc welder uses electricity to heat a metal rod and then deposits the molten metal in the cavities of castings in order to finish them. The gas welder uses an acetylene torch and oxygen to heat the castings and then replaces broken sections and remakes them so as to finish them properly (R. 955). It was uncontroverted that more experience and skill were required in the occupation of gas welder than in the occupation of arc welder (R. 959). Moreover, a gas welder received a higher rate of pay (R. 1116). A cut-off man or burner cuts off risers on casts (R. 1114). A laborer (cut-off) must have sufficient ability with a torch to cut large pieces of scrap metal into smaller pieces, thus enabling them to melt in the cupola without cluttering it (R. 1115).

With the lack of work in November, 1937, both arc welders, C. Novak and Kalamarie, were laid off. C. Novak, having less seniority than Kalamarie, was laid off one day previous (Respondent's Exhibit 6-A, R. 1374). Deskus and Murphy were gas and arc welders (referred to as combination welders). They were the only two welders remaining in the foundry. Deskus had less and Murphy had more seniority than Kalamarie but Deskus was retained because the company needed two gas welders until January, 1938, when Deskus was laid off (R. 958, 1374). The arc welding during this period was done by these two combination welders. Had the company laid off Deskus instead of Kalamarie, its production would have been obstructed because it would have had only one gas welder (R. 958).

Accordingly, Kalamarie was properly laid off according to seniority in the occupation of arc welder. No one took his place, as there was not sufficient work to be performed in that occupation. This fact is important as indicating an absence of discrimination.

The Board's conclusion in its decision and order is that an exception to the occupational seniority policy should have been made for Kalamarie and that he should have been stepped back and displaced either Kouna, Thiele or Melcoskey (R. 1548). Kouna, Thiele and Melcoskey (none of them are welders), who had less plant seniority than Kalamarie, were laid off subsequent to him. Kouna was laid off January 5, 1938, and Thiele and Melcoskey on March 11, 1938. Kouna was designated as a laborer (cut-off), Thiele as a cut-off man and Melcoskey as a chipper (Respondent's Exhibit 6-A, R. 1374).

The reason for the company's refusal to make an exception to the seniority policy for Kalamarie is that such a practice would disrupt the efficiency of the plant. Morley, foreman in the foundry, testified that such a policy in the event of lay-offs might leave some necessary occupations without any qualified workers (R. 1024, 1025). Skeates, the foundry superintendent, testified similarly (R. 961). Berry testified that the plant would be in a chaotic condition if this system were followed because 80% of the employees were skilled men. After absence from a job for any considerable period a worker would have to learn the job again because of constant changes in equipment and methods and this would be accompanied by loss of efficiency (R. 1088 and 1089). Moreover, Berry stated that if the system were followed in the event of lay-offs it would have to be followed in the event of rehirings and men who had been laid off for a period of time would have to become readjusted to jobs they formerly held (R. 1205).

However, the reason for the Board's conclusion that

there should have been an exception in Kalamarie's case to the Company's seniority policy is that Kalamarie would not have taken the promotion if he had known he would thereby forfeit his seniority (R. 1548). Kalamarie desired promotion to the job of arc welder and he could not have the new job without the consequences of a new seniority rating (R. 1064-1066). The Company would not have given him the promotion had it not deemed it permanent at the time it was granted (R. 968, 988, 989). Moreover, when Kalamarie was transferred to the job of arc welder the Company was satisfying his request for a wage increase and a promotion (R. 1064-1066). No slackening of work for arc welders was anticipated (R. 1069). If the Company made exceptions to the occupational seniority policy it would have been impossible to keep that policy objective and carry out its fundamental aim, which was to keep the plant efficiency at its maximum.

The Board in its brief has added another fact as a basis for its conclusion that an exception to the policy should have been made for Kalamarie by relying on the testimony of Kalamarie that he was promised that he could step back to his former occupation (Bd. brief, pp. 56-57). The Board made no finding of such a promise in its decision and order. This alleged promise was denied by his foreman—in fact his foreman told him he would lose his seniority if he took the promotion (R. 1066-1068), and where evidence is controverted only the findings of the Board in its decision and order can be relied upon. (See authority cited on p. 29 of this brief.)

Finally the Board found that Kalamarie was the only one laid off who was hired in 1935 (R. 1548). No inference can be drawn from this fact in view of the Company's strict adherence to its lay-off policy. The fact that such was the case at the time of the hearing does not mean that others who had been hired previous to Kalamarie were not laid off afterwards.

By finding that the company discriminated against Kalamarie because of its failure to give him a job in another occupation, the Board assumed managerial authority over the Company's business and insists that the Company substitute the Board's seniority policy for that which was in use by the Company. The Act does not empower the Board to arrogate such rights of management. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them; that the employer 'may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation and on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.'"

Kalamarie was laid off because of the drastic reduction of employment in the foundry and in strict accordance with the Company's policy, which was a fair and reasonable one (R. 624). The policy contended for by the Board is an unlawful encroachment upon the right of management to plan its production and direct its working forces in accordance with a policy that suits its particular needs. No exception was made either for or against Kalamarie. All the evidence shows that he was promoted at his own request to the job of arc welder after he had joined the Amalgamated and that the promotion was intended by both him and the Company to be permanent. Moreover, after his lay-off no one took his place. Accordingly, the Board erroneously found and concluded that the Company violated sections 8 (1) and 8 (3) of the Act in respect of Kalamarie.

D. Salmons Was Properly Discharged for Engaging in Extraneous Activities on Company Time, Thereby Causing Inefficiency and Disorganization of the Company's Personnel.

The Trial Examiner found that the discharge of Salmons was not discriminatory within the meaning of the Act, and that the complaint as to him should be dismissed (R., 1481). The Board's decision and order overruled the Trial Examiner and found that Salmons was discharged because of his membership in the Amalgamated and his activities in its behalf (R., 1540).

By virtue of the Company's rehiring Salmons on December 21, 1936, as a result of mediation by Beman and Disser, agents of the Board, then associated with the 13th Regional Office, the Board found that Salmons was not entitled to back pay and his continuous employment by the Company obviated reinstatement. Accordingly, the Board's decision and order with reference to Salmons went merely to the 8(1) charges. Since this entire incident took place and was closed by reinstatement over four months before the Independent even started to organize it has no probative value on the domination issue.

The court below held that there was no substantial evidence that Salmons was discriminatorily discharged.

We contend that Salmons' discharge was due to his activity on behalf of the Amalgamated during working hours, with the accompanying impairment of his efficiency and the efficiency of other employees whom he frequently solicited and engaged in conversations about unions.

Salmons had been in the maintenance department doing electrical work for about 14 years prior to his discharge (R., 142). His duties took him to various parts of the plant (R., 170-171). He became interested in the Amalgamated early in September, 1936 (R., 152-153). The Board characterizes Salmons' interest in the Amalgamated as the

result of his dissatisfaction with the Plan, but Salmons was unable to state any important conditions of employment with which he was dissatisfied (R., 1537). He mentioned specifically the occupational disease of silicosis which had been contracted in the past by some of the men in the foundry, but he admitted that the Company had taken measures to prevent such diseases and had recompensed those who had contracted it and had given them easier jobs (R., 186-187).

Salmons admitted union activities on Company time, and the record is replete with instances of such misconduct (R., 196, 208). He passed out CIO application cards to the men in the plant during working hours (R., 196, 208). He circulated around the plant during the course of his duties, and if he obtained the opportunity, would say something to the men about the union (R., 171).

These admissions corroborated the testimony of Berry, who had received information of Salmons' activities on Company time from the supervisory force (R., 1130). He was told that Salmons passed out application cards on Company time and property (R., 1129-30).

Berry testified that on or about September 15, 1936, while making his morning rounds, he saw Salmons talking to one "Long John," a sandslinger operator. About ten minutes later he noticed that Salmons was still talking to him. He asked Salmons if there was anything wrong, and Salmons replied that there was something wrong with the motor. Berry then asked the operator if the motor was running and he replied that it was running all right. Berry then told Salmons to go on his way and keep moving (R., 1131-1132). Later in the day, Berry asked the operator what Salmons was doing and he was told that Salmons was soliciting his membership in the CIO and further that on several occasions the switch was pulled on the sandslinger and then Salmons would take the opportunity to

come over, ostensibly to see what was wrong, but in reality to solicit him to join the CIO (R., 1132).

This incident, as well as Salmons' own admission that he was aware of the consequences of his union activities on Company time, forced the conclusion that Salmons was put on notice (R., 1539, 153).

After the sandslinger incident, Berry continued to receive information from supervisors regarding Salmons' activities on Company time (R., 1132). As a consequence, he discharged Salmons on September 21, 1936 (R., 153, 1132). The Board's decision finds that Berry accused Salmons of spreading union propaganda (R., 1538).

Berry and Conroy, the production superintendent, testified that Salmons was told that he was discharged for using more of the Company's time organizing than working (R., 1122-1123, 1132). Their version is not inconsistent with the Board's finding that Salmons was discharged for "spreading union propaganda", but adds the Company's reason for the discharge, that is, Salmons engaged in these union activities on Company time. The Board's acceptance of Salmons' version should have included his admission that he did *spend Company time* spreading union propaganda. However, the Trial Examiner stated in his intermediate report with reference to Salmons (R., 1481):

> "In view of the record on this case and Salmons' frank admissions, the discharge was not discriminatory within the meaning of the Act."

As we have pointed out, Salmons was rehired on December 21 after mediation by the Board on the express understanding that he would refrain from union activities on Company time. The Company desiring to show the negotiations which led up to Salmons' rehiring and the conditions upon which he was rehired sought subpoenas for Beman, Regional Director, and Disser, Field Investigator. The Trial Examiner denied the Company's application for subpoenas. Subsequently the Company made an offer of

proof which was refused by the Trial Examiner (R., 1134-1135) but was accepted in the Board's decision and order (R., 1520).

Berry testified and it is uncontradicted that he negotiated with Beman and Disser and agreed to take back Salmons because he was told by these agents of the Board that there would be adverse newspaper publicity and high litigation expenses unless Salmons was rehired (R., 1136-1137). In keeping with his agreement, Berry interviewed Salmons and offered him a job as an electrician, which was substantially the same as his old job (R., 1136-1137).

The Board found that it was expressly understood that Salmons was not to engage in union activities on Company time (R., 155, 1538). Salmons testified that Berry told him when he was rehired that "there will be no more running around the plant; there will be no more organizing", to which he (Salmons) replied: "No, there will be no organizing in the plant but there will be lots on the outside" (R., 155). Significantly, Salmons also testified that "Berry did not care what he (Salmons) did off Company time" (R., 178).

The Board argues that Salmons' efforts did not interfere with his work (Bd. brief, p. 48), but the inevitable results of Salmons' aforesaid activities were interference with his (Salmons') work and the work of the men he solicited. Accordingly, the Company was justified in its discharge of Salmons.

The true meaning and intent of section 8(1) of the Act is not to bestow upon the employee the unlimited right to engage in activity without reference to time or place. The employer may insist that such activity be engaged in outside of working hours.

E. The Finding of the Board That the Hiring of Frank Solinko Was Conditioned on Peter Solinko's Joining the Independent Has No Basis in the Record.

The Board found that the Company conditioned its hiring of Frank Solinko, the son of Peter Solinko, on Peter Solinko's joining the Independent (R. 1550). The findings of the Board are directed at the 8 (1) charge. There is no question of reinstatement or back pay involved. Since a blanket 8 (1) cease and desist order was enforced by the court below, the only reason for discussing this incident is to show that the Board's finding in this respect is not supported by substantial evidence and further that since this incident took place after the Independent was organized and recognized it had no relevancy on whether the overwhelming choice of the Independent was free or coerced.

The Board, as its brief points out, credited the testimony of the two Solinkos over a different version given by Stasky and over Kovatch's denial of any participation in the incident (Bd. brief, p. 19). An examination of their testimony shows that the employment of Frank was not conditioned on Pete's joining the Independent.

Frank, the son, said that the day before he went to work he met his father (Pete) in the office of Stasky. When asked if Stasky said anything about the Amalgamated, Frank said that Stasky asked how strong the C. I. O. was but that he (Frank) "didn't pay no attention" (R. 270). Frank said his father left the office but that he stayed for ten minutes to fill out another application blank and that after Stasky looked it over Stasky sent him to the doctor to be examined (R. 265). Frank followed the directions of Stasky and was examined that day and went to work the next morning (R. 266).

The father's story is that when he went to the office his son was there and that Stasky said that he should see

Kovatch and join the Independent while his son stayed in the office. However, Pete then relates that he did not seek out Kovatch and that when Kovatch came by and solicited him he refused to join the Independent, and that he did not join the Independent until the next day after his son started to work. Pete said that he did not know whether Frank was hired the day of the interview or not (R. 252) but Frank said he was hired that day, that he started to work the next morning (R. 266). Since Pete did not join the Independent until the next day, the Board's finding that Frank's employment was conditioned on Pete's joining the Independent has no basis in fact because Frank was hired and started to work before Pete joined. Neither Frank nor Pete said anything about showing Stasky an Independent membership card.

Furthermore, both the father and the son belonged to the Amalgamated as well as the Independent (R. 244, 267). The father joined the Amalgamated first, while the son joined the Independent first (R. 246, 271).

Pete, the father, testified he could not read, and his testimony is confused (R. 245). However, Pete quotes Stasky as telling him when he was laid off in January, 1938, that he (Stasky) did not care "if you pay dues—the Company don't have anything to do with it" and also that Stasky said, "It's your union and the Company has nothing to do with it" (R. 261). Frank testified that Stasky never talked to him about unions (R. 270). Thus, in the testimony of the Solinkos alone, disregarding the testimony of Stasky and Kovatch, the Board's finding is not supported in the record.

F. There Is No Substantial Evidence of Espionage.

The Board found that the Company utilized Cousland for the purpose of espionage and thereby interfered with the rights of the employees guaranteed in section 7

of the Act (R. 1537). The lower court sustained the Board's findings and order as to labor espionage. We contend that there is no substantial evidence of any reporting on union activities and that the Board, in arriving at its findings, employed the use of inferences in the presence of controverting testimony.

Cousland was not one of the 12 confidential operatives of the National Metal Trades Association who reported on union matters, but was an old employee with more than 20 years' service who reported to the Association current conditions in the plant, *excluding union activities* (R. 660, 611, 113). The Association relayed these reports to the company (R. 113, 583, 1157). The Board's witnesses Cousland and Abbott, and the Company's witness, Berry, all testified that Cousland reported on safety, sanitation, dissatisfaction with piecework rates, production and tooling methods, efficiency and time-study matters (R. 113, 114, 120, 1159, 584), yet the Board, in opposition to this positive testimony, finds that Cousland reported on union activities. This finding is based solely upon an inference of an alleged anti-union policy of the National Metal Trades Association, the Company's membership therein and the absence of Cousland's reports (R. 1536, 1537).

Cousland was paid an average of $9 per month by the Association, which amount was to cover his expenses. The Association then billed the Company for this sum. The books and records of the Association which were produced by the Board during the course of the hearing substantiate these payments (R. 599).

The Board found that there was a clear indication that the principal bond between the Company and the Association was that of anti-union policy and that Cousland served that policy (R. 1536). In order to sustain this finding, the Board points out that none of the correspond-

ence between the Company and the Association relates to time study or piecework dissatisfaction, investigation of which is supposed to have been the purpose of the Company in hiring Cousland through the N. M. T. A. (R. 1536). The Company did not hire Cousland through the N. M. T. A. Cousland had been working for the Company for more than two years when he formed his association with the N. M. T. A. (R. 112, 113). The correspondence relating to time study, piecework dissatisfaction, safety, tooling and production methods was not produced because it was not kept by either the Company or the Association (R. 1157, 586). The only correspondence remaining was introduced in evidence as Board's Exhibits 18 and 18a (R. 1321-1336). It indicated that the Company was interested in employer-employee relationships.

The Board has inferred that the Association was violently anti-union and then infers that the principal bond between the Company and the Association was that of anti-union policy from the fact of correspondence between the Association and the Company. However, the correspondence reveals no adoption by the Company of any such policy of the Association and on the contrary indicates disagreement with the Association's policy (R. 1331).

The Board found that Cousland was forced to resign from the Amalgamated in May, 1937, when his role as an undercover agent was made public by the Senate Subcommittee on Civil Liberties (R. 1535-1536). The only evidence in the record as to the reason for Cousland resigning is his statement that he dropped out of the Amalgamated because "I wanted to be decent enough with Mr. Salmon to tell him I had turned over to the other one" (R. 122). The Board also found that Cousland became active as a committee member of the Amalgamated (R. 1536). The record shows that Cousland was never active

in the Amalgamated and the Board's chief witness Salmons so testified (R. 145, 146).

Every piece of positive evidence establishes that Cousland's reports on these innocuous matters ceased in October, 1936 (R. 121, 585). In the face of this evidence the Board finds that his relationship to the company as a labor spy did not terminate until exposure in March, 1937 (R. 1537). No reason whatsoever is advanced by the Board to substantiate this finding. There were no reports after October, 1936. The reports previous to that time did not refer to union activities. The finding has no basis in the record.

The Company's membership in the Association and the manner in which Cousland reported are accepted by the Board in preference to the positive testimony of Abbott, Cousland and Berry, which discloses the following uncontroverted facts: (1) Cousland's reports stopped in October, 1936, whereas organizational activities became consequential in April, 1937; (2) the reports were concerned with dissatisfaction of workmen with piecework rates, safety, sanitation, production and tooling methods (R. 22, 23, 1159, 584); (3) Cousland was not placed in the same category in the books and records of the Association as those men who had been doing undercover work on labor and organizational matters (R. 606, 607); (4) Cousland's pay for writing the reports was insignificant compared to the pay of those who were doing undercover work on labor and organizational matters (R. 599, 612); (5) Cousland had been employed by the Company for 20 years, was paid by the Company as a regular employee and had been reporting on these matters when there was no semblance of a labor organization within the Company's plant.

Therefore, we respectfully submit that there is a total lack of proof of any reporting on union or organizational

activity and that there is no showing whatsoever of any use of Cousland's reports so as to interfere with the rights of employees under section 7(a).

Conclusion.

We respectfully urge that the judgment of the lower court should be affirmed.

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December, 1940.

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APPENDIX I.

NATIONAL LABOR RELATIONS ACT.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151) are as follows:

Findings and Policy. Section 1. * * * It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

SEC. 10.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state

its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. • • •

• • • • • • •

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. • • • The findings of the Board as to the facts, if supported by evidence, shall be conclusive. • • • The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) • • • the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX II.

CHRONOLOGICAL EXTRACTS FROM DEBATES IN THE SENATE AND HOUSE OF REPRESENTATIVES AND COMMITTEE REPORTS THEREIN RELATIVE TO THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO COMPANY UNIONS.

Report of the Senate Committee on Education and Labor on S. 2936, a bill to create a National Industrial Relations Board, May 26, 1934. Senate Report No. 1184, 73rd Congress, Second Session, pp. 4, 5:

"The first unfair labor practice restates the familiar law already enacted by Congress in section 2 of the Norris-La Guardia Act (47 Stat. 70; U. S. C., title 29, sec. 102), in section 77 (p) and (q) of the 1933 amendments to the Bankruptcy Act (47 Stat. 1481; U. S. C., title 11, sec. 205 (p) and (q)), in section 7 (e) of the act creating the office of Federal Coordinator of Transportation (48 Stat. 214; U. S. C., title 49, sec. 257 (e)), in section 2 of the Railway Labor Act of 1926 (44 Stat. 577, U. S. C., title 45, sec. 152) and in section 7 (a) of the National Industrial Recovery Act (48 Stat. 198; U. S. C., title 15, sec. 706 (a)). The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities. And in *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks* (281 U. S. 548 (1930)) the Supreme Court of the United States (in a decision from which there was no dissent) upheld a Federal statute recognizing these rights. Indeed the statute upheld by the Supreme Court was in terms broader than this bill, for it forbade an employer not merely to interfere with or coerce his employees, but even to 'influence' them.

* * * * * * *

"The third unfair labor practice is one that the committee has considered with great care. There was presented to the committee much testimony from Govern-

ment officers, workers, and representatives of labor to the effect that a few employers had dominated labor organizations of their own employees by dictating the terms of their constitutions and by-laws, by refusing to let these labor organizations amend their constitutions without the consent of the employer, by dictating to the organization officials the procedure or agenda for meetings, by indulging in unusual favors prior to or contemporaneously with an election of representatives by the workers, and by making financial contributions to one of several rival labor organizations with the intent of inducing the workers to join the subsidized organization. These practices and others of the same character are clearly abusive and should not be allowed to continue in the few instances where they have existed.

"Yet these abuses do not seem to the committee so general that the Government should forbid employers to indulge in the normal relations and innocent communications which are part of all friendly relations between employer and employee. The policy of the Government is founded upon the theory of democratic collective bargaining, not upon the theory of class war, a conception foreign to industrial conditions in this country. And democratic collective bargaining means the exchange of ideas no less than the exchange of services, goods, or money. The object of the third unfair labor practice is to remove from the industrial scene unfair pressure, not fair discussion."

Senator Wagner's statement on presentation to the Senate of S. 1958, a bill to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes, 74th Congress, First Session, Congressional Record, Vol. 79, pp. 2371, 2372:

"The erroneous impression that the bill expresses a bias for some particular form of union organization probably arises because it outlaws the company-dominated union. Let me emphasize that nothing in the measure discourages employees from uniting on an independent- or company-union basis, if by these terms we mean simply an organization confined to the limits of one plant or one employer. Nothing in the bill prevents employers from maintaining free and direct re-

lations with their workers or from participating in group insurance, mutual welfare, pension systems, and other such activities. The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims."

Testimony of Arno P. Mowitz, representing the Full Fashioned Hosiery Association, before the Senate Committee on Education and Labor, 74th Congress, First Session. Hearings on S. 1958, pp. 304-305:

"We believe that the provisions of this bill undoubtedly favor the kind of activities which we think will not be fair. We find that while you have eliminated the word 'influence' from last year's bill, you nevertheless have significant wording here which leads us to go back to the old principle, and that is this: You say we may not dominate and interfere and those are terms which need and require definition.

* * * * * * *

"We do not know what that means except to limit against the employment of definitions of the words 'dominate or interfere'.

"The Chairman [Senator Walsh]: The purpose is to limit those words as you have stated.

"Mr. Mowitz: We come then to this, that our main objection to the practical phase of this bill is that you tie the employers' hands in an attempt to arrive at amicable relation and working terms with his employees.

"The Chairman: I do not think there is anything in this bill to prevent an employer when his employees, the men and women are about to organize, from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a company union, that is violently opposed to so-and-so who is attempting to organize a union. I do not understand there is anything in this bill to prevent an employer from doing that, and that is why we struck out the word 'influence'. That would be influence, and not interference.

"Senator Wagner: I think you are getting frightened with words."

Testimony of John D. House, member of the Federal Labor Union of Goodyear Tire & Rubber Co. employees, before the Senate Committee on Education and Labor, 74th Congress, First Session. Hearings on S. 1958, pp. 557-558:

"Senator Walsh: When it comes to the question of coercion or interference, that is a different thing. We are now talking about influence. In this bill originally, the word 'influence' was included, to prevent the employer using influence, and so forth, and we struck the word 'influence' out, because we felt that an employer should not be prevented from exercising his influence for or against any particular organization that he thought detrimental to the welfare of his workingmen. Of course they would be left free to reject his advice and views and not to be interfered with if they did not choose to accept it. So that I understand you to say that all you have been doing is in a peaceable way, trying to argue it and persuade these employees that your organization is better than the one they have, for their own good.

"Mr. House: That is true. The whole question would hinge on a definition of what constitutes interference.

"The Chairman: That is a difficult situation. Coercion is more easily definable, but interference would not be, but I personally do not think that peaceably arguing for or against a particular course of action is interference. Do you?

"Mr. House: Here is one thing where it might be interference. You must realize that a man working on a job for a company has an inherent fear of losing his job, so that when the employer takes a definite stand and advises its employees that he favors certain plans, their wills are corrupted because they fear unless they do as he wants them to do, they will lose their job, and without the protection of a bona fide labor union, they are powerless to protect themselves and are therefore fearful of losing their jobs if they incur the displeasure or ill will of the boss.

"The Chairman: After this bill is enacted, if it is enacted, no employees can be discharged without an appeal to the Labor Board if he can prove that the reason for his dismissal is because he did not take the advice of his employer and because he chose some other

organization different from the employer's, and that is one of the arguments made for the bill by its proponents, that it seeks to remove the economic pressure that the employer possesses by reason of his ability to discharge a man if their minds do not meet on a question of what form or character or organization they should join."

Report of the Senate Committee on Education and Labor on S. 1958, May 2, 1935. Senate Report No. 573, 74th Congress, First Session, p. 10:

"This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company.

"The so-called 'company-union' features of the bill are designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies. Such interference exists when employers actively participate in framing the constitution or bylaws of labor organizations; or when, by provisions in the constitution or bylaws, changes in the structure of the organization cannot be made without the consent of the employer. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings. It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of employees."

Statement of Senator Wagner to the Senate on S. 1958, 74th Congress, First Session, May 15, 1935. Congressional Record, Vol. 79, pp. 7569-7570:

"*The Problem of the Company Union.*

"* * * The undue influence which the employer exerts over the supposedly free agent of his workers may take other forms. It may consist in employer domination of the formation of the constitution or bylaws of a labor organization. The essence of inter-

ference is that the workers' organization, instead of being absolutely free and independent as an organic entity, is subjected in some way to the employer's will."

Debate in the Senate on S. 1958, 74th Congress, First Session, May 16, 1935. Congressional Record, Vol. 79, p. 7650:

"Mr. Borah: It has been stated over and over again by the critics of the bill that the bill prohibits the company union. There is nothing in the bill which prohibits a group of men coming together and organizing a company union if they themselves, the workers, desire a company union. The intention is to prevent companies from dominating and controlling a union in making the organization. I want to see the workingman free to join a union or to remain out of a union. I want working men free to form any kind of a union if it is freely formed; that is, formed of the free will of the employees. This bill does not do what so many seem to think."

Report of the House Committee on Labor to the Committee of the Whole House on the State of the Union, June 10, 1935. House Report No. 1147, 74th Congress, First Session, pp. 18, 19:

"Nothing in the bill prohibits the formation of a company union, if by that term is meant an organization of workers confined by their own volition to the boundaries of a particular plant or employer. What is intended to make such organization the free choice of the workers, and not a choice dictated by forms of interference which are weighty precisely because of the existence of the employer-employee relationship.

* * * * * * *

"It should be noted finally that the employer can be said to 'dominate' the 'formation or administration of a labor organization' where several of these forms of interference exist in combination, and he is able thereby to corrupt or override completely the will of employees."

Debates in the House of Representatives pursuant to H. Res. 263, resolving the House into a Committee of the

Whole House on the State of the Union for consideration of S. 1958, June 19, 1935. Congressional Record, Vol. 79, p. 9687:

"'Mr. Eckwall: Under this bill is it not a fact that they can still have company unions not affiliated with any other union?

"Mr. Connery: If the employees want to have a company union in any plant and they vote for a company union, they can have it."